CHEOW SIONG CHIN

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
MOHD. AZMI SCJ
EUSOFFE ABDOOLCADER SCJ
[CRIMINAL APPEAL NO. 48 OF 1984]
28 MARCH 1985

CRIMINAL LAW AND PROCEDURE: *Whether a quantitative restraint of the liberty of an individual by way of confinement within a given perimeter can attract the constitutional writ of habeas corpus.*

The appellant was arrested on 21 June 1984 by the Deputy Minister of Home Affairs under the Restricted Residence Enactment (FMS Cap 39) and was detained initially in police custody and then in prison. The grounds of detention were that as a registered dealer in commodity trading, in 1983, he had cheated the public by giving false promises and false declarations. This led to investors sustaining considerable loss. On 27 August 1984, the Deputy Minister made another order under the same Enactment, requiring the appellant to reside in Gua Musang in Kelantan for 3 years. There was also another order under s. 2A(i) of the Enactment directing him to be placed under police supervision for the 3 years.

The appellant instituted proceedings for a writ of *habeas corpus* under s. 365 of the Criminal Procedure Code which challenged the above orders. He alleged that the accusations were false, that no enquiry had been held before the orders were made and that the provisions of the Enactment were not applicable to the circumstances of his case. Senior Federal Counsel objected that this *habeas corpus* application was misconceived as the appellant was not under detention or in custody. This was upheld by the Judge at first instance and this is an appeal from that decision.

Held:

[1] On the authorities, a writ of *habeas corpus* is only available where the appellant is in actual physical custody.

[2] After reviewing the related cases, it was held that the restraint imposed by an order of restricted residence under the Enactment does not constitute detention of such a nature as to attract the application of a writ of habeas corpus.

[3] On the appellant's contention that his case is not within the Enactment or about the enquiry, the appellant is open to seek relief by order of *certiorari* or a declaration to this effect. In relation to the former, he could try to seek an extension under relevant statutory provisions.

[Appeal dismissed.]

Footnote:
The Court suggested a repeal by Parliament of s. 365 and such of its concomitant provisions in Chapter XXXVI of the Criminal Procedure Code because of O. 54 of the Rules of the High Court 1980 which itself provides for applications for *habeas corpus*.

Cases referred to:
Reg. v Coleshill Justices, Ex parte Davies [1971] 1 WLR 1684
Re Onkar Shrian [1970] 1 MLJ 28
Re Isbell [1930] SCR 62
Masella v. Langlais [1955] SCR 263
Barnardo v. Ford [1892] AC 326
Ex parte Mwenya [1960] 1 QB 241
Ismail and Anor v. State of Orissa [1951] AIR Orissa 86
Reg. v. Secretary of State for the Home Department, Ex parte Mughal [1973] 1 WLR 1133
Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar [1976] QB 606
Reg. v. Secretary of State for Foreign Affairs, Ex parte Greenberg [1947] 2 All ER 550
Bird v. Jones [1845] 7 QB 742
Syed Mahamad Yusuf-Ud-Din v. Secretary of State of India [1903] 19 TLR 496; 30 IA 154
Hazoor Ara Begum v. Deputy Commissioner, Gonda [1934] AIR Oudh 301
Bimla Devi v. Chaturvedi & Ors. [1953] AIR All 613
Wales v. Whitney [1885] 114 US 564
Rex v. Secretary of State for Home Affairs, Exparte Duke of Chateau Thierry [1917] 1 KB 922
Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour and Manpower & Anor. [1983] 2 MLJ 54; [1983] CLJ (Rep) 266
Haley v. Comissioner for Corrective Services [1975] 1 NSWLR 118
Rex v. Denison, Ex parte Nagale [1916] 85 LJ KB 1744
Ronnfeldt v. Phillips & Ors. [1918] 35 TLR 46

Legislation referred to:
Criminal Procedure Code, s. 365.
Criminal Procedure Code [Ind], s. 491
Restricted Residence Enactment (FMS Cap 39), ss. 2(ii), 2A(i).
Rules of the High Court 1980, O. 54

For the appellant - Karpal Singh (Low Chin Kiat with him); M/s. Karpal Singh & Co.
For the respondents - Mohd. Noor Ahmad, SFC

JUDGMENT

Eusoffe Abdoolcader SCJ:

The primary issue for determination in this appeal is the question whether a quantitative restraint of the liberty of an individual by way of his confinement within a given perimeter can attract the constitutional writ of *habeas corpus.*

The brief facts of this matter are that the appellant was arrested under an order made on 21 June 1984 by the Deputy Minister of Home Affairs under the Restricted Residence Enactment (FMS Cap 39) ('the Enactment') and detained initially in police custody and then in prison. The grounds of his detention were that as a registered dealer in commodity trading he had in 1983 cheated the public by giving false promises and making false declarations as a result of which many investors sustained considerable financial loss. Representations were made by and on his behalf against this order but to no avail and on 27 August 1984 the Deputy Minister made another order under s. 2(ii) of the Enactment requiring the appellant to reside in the town of Gua Musang in Kelantan for a period of three years from the date of the order, and also a further order under s. 2A(i) of the Enactment directing him to be placed under police supervision for the same period. These two orders were served on the appellant at Pudu Prison on 3 September 1984 and he was then taken to Gua Musang pursuant thereto.

The appellant took out a motion under s. 365 of the Criminal Procedure Code on 28 September 1984 for a writ of *habeas corpus* to challenge the orders made under the Enactment on the grounds that the allegations against him were false, no enquiry had been held before the orders were made and that in any event the provisions of the Enactment were not applicable to the circumstances of his case. At the outset of the hearing Senior Federal Counsel appearing for the respondents raised the preliminary point that the application for *habeas corpus* was misconceived as the applicant was not under detention or in custody. After hearing argument on this point Gunn Chit Tuan J, on 26 October 1984 upheld the objection taken and dismissed the appellant's application for *habeas corpus, a quo* this appeal emanates.

The question of quantitative restraint such as that posed for consideration in these proceedings should strictly be distinguished from curtailment of freedom in a qualitative context where this relates not so much to confinement within a designated area as to restriction imposed on a person's right to live and to come and go as he pleases, as in the case of a person released from actual physical custody but put on a bail bond, but the underlying principle would appear to be the same in both cases. In *Reg. v. Coleshill Justices, Ex parte Davies* [1971] 1 WLR 1684 it was said (at p. 1686) that an application for *habeas corpus* had become academic, as the applicants had in the meantime been released on bail. The Singapore High Court held in *Re Onkar Shrian* [1970] 1 MLJ 28 that a person at large on bail after his arrest is not entitled to a writ of *habeas corpus* because he was not then detained in custody. It has also been conclusively resolved in several Canadian cases that the writ is only available where the applicant is in actual physical custody, and not when he is on bail, and we need only refer to two decisions of the Supreme Court of Canada, *Re Isbell* [1930] SCR 62 (at p. 65) and *Masella v. Langlais* [1955] SCR 263 (at p. 271)

In considering whether in relation to restricted residence under the Enactment *habeas corpus* lies, it would be just as well to remember that the application in these proceedings was made under the provisions of s. 365(i)(b) of the Criminal Procedure Code which specifically refer to illegal or improper detention in public or private custody. In *Barnardo v. Ford* [1892] AC 326 Lord Watson said (at p. 333):

> The remedy of *habeas corpus* is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody ... it is the fact of detention, and nothing else, which gives the Court its jurisdiction ...

An involuntary and illegal confinement of the person *in praesenti* is the particular concern of *habeas corpus.* A person kept in police custody or locked up in jail is obviously detained, but there are less obvious situations as in the matter before us where the appellant is restricted in residence to the town of Gua Musang.

There is hardly any authority with regard to this sort of territorial restraint but in *Ex parte Mwenya* [1960] 1 QB 241 where the authorities had ordered the applicant to remain within a certain district of roughly 1,500 square miles, the Court left open the question as to whether such an order constituted a 'detention' for the purposes of a *habeas corpus* application since it was agreed by the parties not to argue the propriety of issuing the writ to test such a restraint (at pp. 245-6, *arguendo*). The High Court of Orissa held in *Ismail and Anor. v. State of Orissa* [1951] AIR Orissa 86 (at p. 89) that a writ of *habeas corpus* will not go against an order of internment (directing restricted residence under statutory provisions basically identical of their equipollent in the Enactment) as this is not 'detention' as ordinarily understood.

In *Reg.v. Secretary of State for the Home Department, Ex parte Mughal* [1973] 1 WLR 1133, the applicant chose, on being refused admission into England, to contest the validity of that refusal by an application for *habeas corpus*, and so he refused to leave the country as he could have done but surrendered to the authorities when he was placed in prison pending the outcome of the *habeas corpus* case. Lord Widgery CJ thought (*obiter*) that this was not a case for *habeas corpus* because the applicant was not in custody - there had not been a total deprivation of his freedom. The same reasoning was applied in *Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] QB 606 and *Reg. v. Secretary of State for Foreign Affairs, Ex parte Greenberg* [1947] 2 All ER 550.

The reasoning in the cases we have referred to would appear to be directly in line with that in *Bird v. Jones* [1845] 7 QB 742, a false imprisonment action in which it was held that partial restriction of freedom of movement is not an imprisonment, where Lord Coleridge CJ said (at p. 744):

> And I am of the opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom, it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power exterior to our own.

The Privy Council applied Lord Coleridge CJ's definition in another false imprisonment case: *Syed Mahamad Yusuf-Ud-Din v. Secretary of State of India* [1903] 19 TLR 496; 30 IA 154 where it was held that even though a person on bail is technically in the custody of his surety, he is not 'imprisoned'.

In Hazoor Ara Begum v. Deputy Commissioner, Gonda [1934] AIR Oudh 301, the applicant, the Rani of Uttraula filed an application under s. 491 of the Indian Criminal Procedure Code (the equivalent of s. 365 of our Criminal Procedure Code) on the ground that the restraint imposed on her to see anybody whom she wished to see was sufficient to entitle her to relief under the equivalent of s. 365(i)(b) of our Code. There was absolutely no restriction on the liberty of movement of the Rani. Srivastava J., without hesitation rejected the argument of the Rani and stated that the words 'restraint' and 'custody' implied physical restraint or confinement. It has also been held that mere surveillance, though not a pleasure, is not detention: *Bimla Devi. v. Chaturvedi & Ors.* [1953] AIR All 613.

In an American case, *Wales v.Whitney* [1885] 114 US 564, the Secretary of the Navy of the United States served an order on the Medical Director that he should not leave the city of Washington until further orders. The Medical Director moved for a writ of *habeas corpus* before the Supreme Court of Columbia which dismissed the motion for the reason that the grounds set out by the applicant did not constitute physical restraint at all. On appeal to the Supreme Court of the United States the lower Court judgement was affirmed, and Miller J, delivering the opinion of the Court, said:

> It is obvious that the petitioner is under no physical restraint. He walked the streets of Washington with no one to hinder his movements, just as he did before the Secretary's order was served on him.

Miller J added that

> there is no very satisfactory defination to be found in the adjudged cases, of the character of restraint or imprisonment suffered by a party applying for the writ of *habeas corpus* which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief ... Obviously the extent and character of the restraint which justifies the writ must vary according to the nature of control which is asserted over the party in whose behalf the writ is prayed.

On a consideration of the authorities we have adumbrated, none of which, except for two, were referred to in the Court below or before us, we are of the view that the restraint imposed by reason of an order of restricted residence under the Enactment does not constitute detention of such a nature as to attract the application of the writ of *habeas corpus.* The writ of *habeas corpus* is accordingly not available to the appellant in the circumstance but we would immediately observe consequent to the conclusion we have come to that this denial does not mean that he is without remedy in his quest to challenge the orders made against him or that his right of recourse to the fundamental maxim *'ubi jus ibi remedium'* (there is no wrong without a remedy) is thwarted. On the basis of his claim that his case did not come within the scope ambit and purview of the Enactment or that an enquiry should have been held before the orders were made, it would be open to him to seek relief by way of an order of *certiorari* or a declaration to this effect. An order of *certiorari* may in appropriate circumstance serve the same purpose as *habeas corpus* (*Rex v. Secretary of State for Home Affairs, Ex parte Duke of Chateau Thierry* [1917] 1 KB 922 (at p. 930), but for this we would observe that he appears to be out of time unless it is extended under the relevant statutory provisions: *Mersing Omnibus Co. Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1983] CLJ (Rep) 266), and in *Haley v.Commissioner for Corrective Services* [1975] 1 NSWLR 118 it was assumed *sub silentio* that a First World War, emergency regulations restricting movement out of or into certain parts of England under the Defence of the Realm Acts, 1914 -15 [the precursor to the Emergency Powers (Defence) Act, 1939 enacted during the Second World War under which equipollent regulations were promulgated] empowered the making of an order by the competent military authority in prescribed circumstance to prohibit a person from residing in or entering any specified area, and such orders were sought to be assailed, unsuccessfully on the facts and merits of the matter in each case, in *Rex v. Denison, Ex parte Nagale* [1916] 85 LJ KB 1744 in the Divisional Court of the King's Bench Division by way of writs of prohibition and *certiorari,* and in *Ronnfeldt v. Phillips & Ors.* [1918] 35 TLR 46 in the Court of Appeal by way of a declaration that the order was *ultra vires* and void and an injunction to restrain the defendants in that case from preventing him from returning to the area from which he was barred.

We accordingly at the conclusion of argument dismissed this appeal for the reasons we have given.

We would as a footnote suggest for urgent consideration the repeal by Parliament of s. 365 and such of its concomitant provisions in Chapter XXXVI of the Criminal Procedure Code as have been rendered redundant as a result of the introduction of O. 54 of the Rules of the High Court, 1980 which provides for applications for *habeas corpus.*

Also found at [1985] 1 CLJ 229